Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-297

JACOB SCHAEFER,

Petitioner,

vs.

DANIEL LEONE, Warden
Hartford, Connecticut Correctional Center,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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DANIEL LEONE, Warden,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Jacob Schaefer, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review the decision and judgment of that Court entered on May 24, 1971, reversing the order of the District Court for the District of Connecticut granting a petition for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit entered on May 24, 1971 is appended as Appendix A. This opinion reversed a judgment of the United States District Court for the District of Connecticut granting relief to the petitioner which is appended as Appendix B. The opinion of the Appellate Division of the Connecticut Circuit Court sustaining the original conviction of Jacob Schaefer is appended as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 24, 1971. The statutory provision believed to confer on this Court jurisdiction to review that judgment by writ of certiorari is 28 U.S.C. §1254 (1).

QUESTION PRESENTED

Succinctly stated, the question presented to this Court is as follows:

> May a state trial judge instruct a jury to find an accused guilty of a charge that (a) was never made, and (b) would be constitutionally impermissible if made.

This issue arose when the Connecticut trial court instructed the jury that the mere possession of gambling odds, "lines," and/or "point spreads" is a crime under the Connecticut Pool-Selling statute. It is conceded by all reviewing tribunals thus far that the petitioner took timely exception to these instructions. It is conceded by both the District Court and the Court of Appeals that the instructions were erroneous.

The District Court, in granting the writ of habeas corpus ruled that "the conclusion that the petitioner's constitutional rights were violated at his trial is *inescapable*." (emphasis added).

On the other hand, the Court of Appeals, in reversing the judgment of the District Court ruled, inter alia, that the issues involved did not raise a question of "constitutional dimension."

The intervention of this Court is now sought to (1) gain relief from the deprivation of the petitioner's rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution, (2) gain an ultimate arbitration of a Federal question which has produced two irreconcilable views in two arms of the Federal judicial system, and (3) to prevent a grave and far reaching defect in the application of Connecticut law insofar as it will harmfully affect the legal status of tens of thousands of Connecticut citizens.

CONSTITUTIONAL AMENDMENTS INVOLVED

Amendment I – Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV – Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The petitioner was charged in a single count information with Pool Selling in violation of Section 53-295, Connecticut General Statutes.[1] After a six day trial to a jury, a verdict of guilty was re-

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[1] §53-295 Pool Selling. Any person, whether as principal, agent or servant, who owns, possesses, keeps, manages, maintains or occupies, or assists in keeping, managing, maintaining or occupying, any building, room, office, park, ground, enclosure or place with apparatus, books or boards or any device for the purpose of making, recording or registering bets or wagers, or of buying or selling pools upon the result of any trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of any game, competition, political nomination, appointment or election,

turned and accepted on February 15, 1968, in Circuit Court No. 17, Bristol, Connecticut.

The conviction resulted from evidence seized from petitioner's possession and in his home on November 28, 1966. Said evidence, seized by the Connecticut State Police, under the authority of a search warrant, included papers identified at trial as a National Armstrong Daily, a publication containing current-racing information and betting odds thereon. Other evidence seized and admitted, consisted of several football schedules containing handwritten numbers identified at trial as "lines" or "point spreads" and the charred remains of other sporting schedules retrieved from petitioner's fireplace which contained notations described at trial as "late" or "corrected betting odds."

At the conclusion of the evidence the trial judge instructed the jury, inter alia:

"The statute also prohibits one from having in his possession or under his control a betting line. It does not specifically say so, or odds upon football games as the possession of this line or odds as (is) prohibited by that portion of the statute which prohibits one from being concerned in pool selling. And, if you find that the defendant did have such a line or lines or odds in his possession and under his control, you should find him guilty in this respect."

Petitioner took timely exception to this instruction and thereafter, in an appeal of his conviction to the Appellate Division of the Circuit

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whether such trial, contest, game, competition, nomination, appointment or election takes place either within or without this state, or where pool selling of any kind, either directly or indirectly, is permitted or carried on, or in which the business of transmitting money to any race track or other place there to be placed or bet on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, is permitted or carried on in any manner, and any person who keeps a place which is reputed to be a place resorted to for the purpose of selling pools upon the result of any election, and any person who makes, records or registers any such wagers or bets, or buys or sells, or is concerned in buying or selling, any such pools, or in carrying on the business of the transmission of money to any race track or other place there to be bet or placed on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, and any person who, being the owner, lessee or occupant of any building, room, park, ground,

Court, State of Connecticut, argued orally and in his brief that "possession of gambling odds cannot constitutionally be made an offense." As is apparent from that tribunal's opinion the argument was not even discussed in constitutional terms at all.

Possession of the materials in question, i.e., *gambling odds, was never contested by the petitioner.* Rather, it was argued, gambling odds are given wide and daily circulation in even local newspapers and their possession, in and of itself, is innocuous.

Following the adverse decision of the Appellate Division, petitioner then requested the Connecticut Supreme Court of Errors to certify a substantial issue for appeal. In his Petition for Certification petitioner requested Connecticut's highest Appellate Court to consider his exception to the "possession or control of betting lines" portion of the trial court's charge. The Supreme Court of Errors denied certification on September 24, 1969. *Appendix D.*

Having been committed to the Hartford Correctional Center thereafter, the petitioner filed an Application for a Writ of Habeas Corpus in the United States District Court, District of Connecticut at Hartford. On the 12th day of November, 1969, the writ was sustained by said Court, Blumenfeld, J. whereupon the State of Connecticut appealed to the United States Court of Appeals, Second Circuit. The said appeal was argued on January 27, 1971 and on May 24, 1971, the Court of Appeals reversed the ruling of the District Court.

The petitioner was granted a Stay of Mandate from the Court of Appeals and now petitions this Court for issuance of a Writ of Certiorari.

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enclosure or place, or part thereof, knowingly permits the same to be used or occupied for any such purpose, shall be fined not more than five hundred dollars or be imprisoned not more than one year or be both fined and imprisoned; and each day of such owning, keeping, occupying, permitting or transmitting shall constitute a separate offense. Any person who becomes the custodian or depositary of any pools, money, property or thing of value, in any manner wagered or bet upon such result, or of any apparatus of any kind used for the purpose of assisting in buying or selling any such pools or making any such wagers or bets, shall be punished in like manner. The provisions of this section shall not prohibit the giving of purses or premiums for any trial or contest of skill, speed or endurance of man, beast, bird or machine and the charging of an admission or entrance fee to any contestant in any such trial or contest. (1949 Rev., §8672; 1953, Supp. §3307d.)

REASONS FOR GRANTING THE WRIT

I

First and foremost, the extraordinary clash of opinions between two branches of the Federal judiciary should commend this petition to the Court's attention in and of itself.

On the one hand, the District Court meticulously reasons that there was error in the instruction and, then, applying the test fashioned in *Chapman v. California*, 386 U.S. 18, rehearing denied, 386, U.S. 987 (1967), further reasons that the test for harmless error is in issue, and, citing *Chapman* concludes that a retrial is required unless the error is "harmless beyond a reasonable doubt." *Id.* at 24.

The Court of Appeals seemingly acknowledges the fact that there was error when it states:

". . . the challenged instruction concededly was objected to specifically and in timely fashion, and . . . 'mere possession' is not one of the five sets of circumstances under which one can be found guilty of 'pool selling' in Connecticut."

Then, without even an *allusion* to the District Court's adherence to the guidelines of *Chapman* or, in fact, to the *existence* of the *Chapman* doctrine the Court of Appeals with an almost startling abruptness terminates the matter thusly:

". . . we reverse because the District Court did not properly have jurisdiction over Schaefer's habeas corpus petition, as it had not raised any question of substantial constitutional significance."

Surely the dialogue between the District and Appeals Courts has been aborted by either a misunderstanding or misapplication of the *Chapman* test. It is respectfully submitted that it is incumbent upon this Court to both reaffirm the existence of *Chapman* and to insert it into the context of the dialogue between these two branches of the Federal judiciary. For if *Chapman* means what it says then the pronouncement by the Court of Appeals of a lack of "substantial significance" in the instant case either ignores or flies in the face of the holding therein.

II

The State, in its brief filed in the District Court in opposition to the Application for a Writ of Habeas Corpus, concedes that "Pool Selling" is not a possessory crime. Yet, the questioned instructions by the trial court unquestionably rendered it a possessory crime. Herein lies an obvious incongruity.

If the Legislature of Connecticut had inserted the language of the trial court in the statute the law would be struck down as constitutionally intolerable in light of this Court's holding in *Stanley v. Georgia* 394 U.S. 557 (1969). At the risk of seeming presumptuous, the petitioner suggests that legislation condemning private possession of gambling odds would be given far less time and attention, constitutionally speaking, than the laws concerning obscene materials in the *Stanley* home. Yet the constitutionally abhorrent elements of *Stanley* are present herein. However, the petitioner is paralyzed by the Court of Appeals' holding, since that Court directs, in effect, that where a legislature creates a defective law we will give you relief but whenever a trial judge creates the same effect by its jury instructions we choose to regard such a miscarriage as a matter between you and your State, i.e., your federally guaranteed rights are in the exclusive discretion of State tribunals.

The District Court, in this regard, invoked the language of *Morrissette v. United States,* 342 U.S. 246, 263 (1952) viz:

"The spirit of the doctrine which denies to the . . judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute."

Apparently the Court of Appeals took issue with the use of the excerpted language because of a pronounced disparity in the underlying factual situations. Here again there appears manifest a block in the communication lanes between District and Appeals Courts. For the District Court, as the petitioner interprets it, uses *Morrissette's* trenchant language as a rearticulation of the Constitution's insistence on separation of powers, stating, in effect, that the judiciary shall not create *any* laws, either constitutional or unconstitutional.

The language of *Morrissette* expresses the soundest of constitutional precepts and, moreover, characterizes the plight of the petitioner. For he is, at one and the same time, victimized by (a) judicial law-making which is prohibited by the Constitution, and (b) an invalid law which is a direct result of that prohibited practice.

III

The Court of Appeals in its conclusion holds "that the legality of Schaefer's conviction was properly the exclusive province of the Connecticut courts." Assuming that having applied the *Chapman* test of error to the admitted error at hand it is determined that the said error is firstly harmful and secondly violative of the petitioner's rights to due process. Then, certainly, the Federal judiciary is constitutionally constrained to intervene. Failure to intervene is tantamount to abdication of its function. If the verdict of the jury was rendered on an unconstitutional ground then the conviction cannot stand. *Williams v. North Carolina,* 317 U.S. 287, 292 (1942), *Stromberg v. California,* 283 U.S. 359 (1931). If the jury was instructed that possession of gambling odds is a crime under the Connecticut "Pool Selling" law and it becomes clear that that theory is both harmful and unconstitutional then the verdict must be set aside by the Federal judiciary if its function in this system of constitutional government is to be maintained. See *Leary v. United States,* 395 U.S. 6. 31, 32 (1969).

IV

The Court of Appeal relies heavily, in the concluding phase of its opinion, on a federal hands off policy as regards State court actions. It quotes from *Gryger v. Burke,* 334 U.S. 728, 731 (1948) in part, as follows:

"We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state law would come here as a federal question."

On that very point the District Court had said:

"A state court's charge to a jury *is* reviewable by a federal court on habeas corpus only where federal constitutional rights are in-

volved," citing *Bollenbach v. United States*, 326 U.S. 607, 614-615 (1946). (emphasis added)

Hence it is readily ascertainable that the two courts are in partial agreement on one point, i.e., federal intervention in state proceedings is rarely if ever justified. But the District Court goes to great pains to draw attention to one of the rare justifications for federal review, namely where *federal* constitutional rights are involved. The Appeals Court, for reasons that do not seem apparent, sidesteps this all-pervasive consideration entirely, just as it refused to come to terms with the *Chapman* doctrine earlier.

The conflict between the two tribunals could perhaps be focused more dramatically by extracting the *Gryger* rationale, employed by the Court of Appeals as a basis of reversal, and interpolating a crucial phrase and creating, thereby, the ultimate question to be answered by this Court:

"We cannot treat a mere error of state law. . . (even where federal constitutional rights are involved . . .) as a denial of due process."

Surely, *Gryger* did not stand for so sweeping an abstention of federal powers of review.[2] Yet obviously that is the sense in which it is exploited by the Court of Appeals to reverse the District Court.

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[2] *Gryger v. Burke* involved a claim by the petitioner of a denial of due process in that (1) he was sentenced as a fourth offender under a Pennsylvania habitual criminal statute without counsel, (2) one of the convictions on which the sentence was based occurred before the enactment of the Pennsylvania Habitual Criminal Act, and (3) sentencing under the Act unconstitutionally subjected him to double jeopardy. The majority opinion noted that the sentencing judge regarded the sentence as mandatory and not discretionary in imposing same. As to this feature the Supreme Court said: "It is neither clear that the sentencing court so construed the statute, nor if he did that we are empowered to pronounce it an error of Pennsylvania law." Continuing, the Supreme Court closed the discussion with the language used by the Court of Appeals in the instant case. "We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declining that due process has been denied. . ." It seems apparent that the applicability of the *Gryger* rationale to the case at hand is, at best, dubious.

V

In summary, one can pose the issue with finality and force by juxtapositioning the elements which entered into the respective opinions of the two Courts.

A. District Court

Judge Blumenfeld found clear error in the trial court's instruction. The trial court was without authority to so instruct. Said instructions involved and impaired the petitioner's constitutional rights in charging him with a crime that was non-existent and/or constitutionally impermissible. The error was harmful as measured by the test devised in *Chapman v. California*, supra.

B. Court of Appeals

There was error in the instructions. However, petitioner had had fair notice of the charge. (Note: The Court does not show how or where in the pleadings or proceedings the petitioner was notified that he was charged with a crime based on mere possession of gambling odds. District Court *did* note). He had a full trial and review. The petition did not raise a question of substantial constitutional significance. A mere error (bypassing any consideration of *Chapman*) of state law cannot be treated as a denial of due process.

The positions of the two courts herein are so irreconcilable that it is respectfully submitted that this Court's intervention and clarification is almost imperative if coherence of precedents in the Federal system is to be maintained.

VI

Apart from the main suggested reason for review, hereinbefore set forth, there remains another, perhaps equally vital, need for this Court's participation. And that is, that if the proceedings are finalized at this juncture, and this petition denied, is it not certain that Connecticut courts henceforth can employ the erroneous instruction herein involved, viz: "possession of gambling odds is a crime," with the implied sanction of the Federal judiciary. And, this being so, will not hundreds of thousands of Connecticut residents each and every day be subject to its provisions by the mere purchase of a daily newspaper containing such materials.

Or, to restate the proposition, will not this Court, by refusal of this petition, endorse as valid a "law" which would be declared unconstitutional by the Federal Judiciary. See *Kelly v. Illinois Bell Telephone Co.* 210 F. Supp. 456, 465 (N.D. Ill. 1962) aff'd 325 F. 2d (7th Cir. 1963).

CONCLUSION

It is respectfully submitted that the decision of the Circuit Court of Appeals for the Second Circuit, in the instant matter, is indirectly in conflict with the decision of the Court in the case of *Stanley v. Georgia,* that it ignores the test for error devised by this Court in *Chapman v. California,* and that it has misinterpreted and misapplied this Court's decision in *Gryger v. Burke* and for these reasons, and others set forth above, it is urged that the petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN P. McKEON
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 311—September Term, 1970.

(Argued January 27, 1971 Decided May 24, 1971.)

Docket No. 34493

JACOB SCHAEFER,

Appellee,

—v.—

DANIEL LEONE, Warden, Hartford Correction Center,

Appellant.

Before:

WATERMAN, MOORE and FEINBERG,

Circuit Judges.

Appeal from an order of the United States District Court for the District of Connecticut (Blumenfeld, *Judge*) granting a writ of habeas corpus on the ground that petitioner's conviction upon a State court trial in Connecticut had been unconstitutionally secured through an erroneous instruction to the jury.

Reversed.

JOHN F. MULCAHY, JR., Deputy Chief Prosecutor, New Haven, Connecticut, *for Appellant.*

JOHN P. MCKEON, Hartford, Connecticut, *for Appellee.*

Appendix A.

MOORE, *Circuit Judge*:

Daniel Leone, Warden of the Hartford Correctional Center, appeals from the granting of appellee Jacob Schaefer's petition for a writ of habeas corpus. The sole issue presented for review is whether a misstatement of Connecticut law by a Connecticut trial court to a jury regarding provable elements of the crime charged, held by the Connecticut appellate courts to constitute non-reversible error, is a question of constitutional dimension thereby creating a substantial federal question cognizable by the federal courts under their habeas corpus jurisdiction. We reverse.

FACTS AND PROCEDURAL HISTORY

Appellee Schaefer sought release from imprisonment following his conviction by a jury on March 18, 1968,[1] on a single count of "pool selling" in violation of the Connecticut anti-pool selling statute, Conn. Gen. Stat. §53-295, the text of which is reproduced in the margin.[2] Evidence seized

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[1] *State v. Schaefer*, CR-17-5828 (Cir. Ct. 17, March 18, 1968).

[2] Section 53-295 reads as follows:

"Pool Selling.

Any person, whether as principal, agent or servant, who owns, possesses, keeps, manages, maintains or occupies, or assists in keeping, managing, maintaining or occupying, any building, room, office, park, ground, enclosure or place with apparatus, books or boards or any device for the purpose of making, recording or registering bets or wagers, or of buying or selling pools upon the result of any trial or contest of skill, speed or endurance of man, beast, bird or machine, or upon the result of any game, competition, political nomination, appointment or election, whether such trial, contest, game, competition, nomination, appointment or election takes place either within or without this state, or where pool selling of any kind, either directly or indirectly, is permitted or carried on, or in which the business of transmitting money to any race track or other place there to be placed or bet on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state,

from Schaefer's possession which was introduced at trial included two pieces of paper identified at trial as bookmakers' "tally sheets," a National Armstrong Daily (a publication containing current racing information and betting odds), several football schedules containing handwritten numbers identified at trial as "lines" or "point spreads" and the charred remains of other papers retrieved from Schaefer's fireplace identified at trial as bookmakers' "worksheets" containing notations of names, initials and dollar amounts.

Schaefer appealed his conviction to the Appellate Division of the Connecticut Circuit Court, claiming, in part,

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is permitted or carried on in any manner, and any person who keeps a place which is reputed to be a place resorted to for the purpose of selling pools upon the result of any election, and any person who makes, records or registers any such wagers or bets, or buys or sells, or is concerned in buying or selling, any such pools, or in carrying on the business of the transmission of money to any race track or other place there to be bet or placed on any horse race, game, sport, competition, nomination, appointment or election, whether within or without this state, and any person who, being the owner, lessee or occupant of any building, room, park, ground, enclosure or place, or part thereof, knowingly permits the same to be used or occupied for any such purpose, on the first conviction shall be fined not more than one thousand dollars or be imprisoned not more than one year or both fined and imprisoned; and on a second or subsequent conviction shall be fined not less than five hundred dollars nor more than three thousand dollars and be imprisoned not less than thirty days nor more than three years; and each day of such owning, keeping, occupying, permitting or transmitting shall constitute a separate offense. Any person who becomes the custodian or depositary of any pools, money, property or thing of value, in any manner wagered or bet upon such result, or of any apparatus of any kind used for the purpose of assisting in buying or selling any such pools or making any such wagers or bets, shall be punished in like manner. The provisions of this section shall not prohibit the giving of purses or premiums for any trial or contest of skill, speed or endurance of man, beast, bird or machine and the charging of an admission or entrance fee to any contestant in any such trial or contest."

error in the charge to the jury. The conviction was affirmed,[3] the court finding that "[r]eading this portion of the charge as well as the charge as a whole, it meets the test of correctness and adequacy and should be sustained."[4] On September 24, 1969, the Connecticut Supreme Court refused to certify the jury charge issue for appeal.[5] Having exhausted his State remedies, Schaefer petitioned the United States District Court for a writ of habeas corpus on October 6, 1969, pursuant to 28 U.S.C. §2254.

Discussion

The thrust of Schaefer's petition is that the trial court's assumed misinterpretation of the requirements of the applicable Connecticut statute in his charge to the jury (which is set forth in the margin),[6] in failing to include reference to criminal intent,[7] resulted in Schaefer's allegedly unconstitutional conviction of a nonexistent crime, in violation

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3 *State* v. *Schaefer*, CR-17-5828 AP, Vol. IX, App. Div. No. 26 (June 13, 1969).

4 *Id.* at 16.

5 *State* v. *Schaefer*; Vol. XXXI, No. 15, Conn. L.J. 9 (1969).

6 The trial court's charge with respect to the statutory elements of the crime of "pool selling" in pertinent part reads as follows:

> 153. "*The statute also prohibits one from having in his possession and under his control a betting line. It does not specifically say so,* or odds upon football games as the possession of this line or odds as [is] prohibited by that portion of the statute which prohibits one from being concerned in pool selling. *And, if you find that the defendant did have such a line or lines or odds in his possession and under his control, you should find him guilty in this respect.*" [Emphasis supplied.]

7 What the trial judge arguably did through the challenged instruction was to afford the jury the opportunity to convict Schaefer under §53-295 without apprising them of the necessary element of "possession *for the purpose of* buying or selling pools." [Emphasis supplied.] This omission the District Court found the Connecticut trial judge without constitutional authority to do. Memorandum of Decision at 15a.

of his rights under the First, Fifth and Fourteenth Amendments. Although the challenged instruction concededly was objected to specifically and in timely fashion, and although "mere possession" is not one of the five sets of circumstances under which one can be found guilty of "pool selling" in Connecticut, we reverse because the District Court did not properly have jurisdiction over Schaefer's habeas corpus petition, as it had not raised any question of substantial constitutional significance.

In justifying the existence of a fundamental question of constitutional significance, Schaefer and the District Court have relied on the authority of *Cole* v. *Arkansas*.[8] In *Cole*, the Supreme Court reversed convictions which had previously been affirmed by State appellate courts on the basis of a substantive statutory section completely different from that for the violation of which the defendants were charged, tried and convicted in the first instance. As this *precis* and the language of *Cole* itself indicate the issue there was one of reasonable notice to a defendant of the charge brought and a fair opportunity to prepare and present a defense thereto. No allegation of constitutionally inadequate notice is made here. Rather, Schaefer strongly urges us to uphold the District Court's reliance on *Cole* and asks us to disregard the facts (1) that he had fair notice of the substantive charge against him, and (2) that he was afforded a full and fair trial thereon, followed by appellate review of the jury instruction question through Connecticut's highest court.

Morrissette v. *United States*,[9] also relied upon by Schaefer and the District Court in attempting to demonstrate the "fundamental unfairness" of the State trial

8 333 U.S. 196, 201 (1948).

9 342 U.S. 246, 263 (1952).

court's error of omission, is clearly distinguishable from the case at bar. *Morrissette* was concerned not at all with any constitutional question, but solely with determining the import of Congressional omission of the requirement of guilty intent in a statutory offense. The Supreme Court in *Morrissette* granted certiorari for the narrow purpose of reviewing a federal trial court's instruction with respect to the elements of a federal offense in its supervisory capacity over the federal courts.

Upon the facts here presented, we hold that the legality of Schaefer's conviction was properly the exclusive province of the Connecticut courts.[10] Were we to hold otherwise, the District Court's rationale would turn every disagreement by a federal district judge with a State court's interpretation of a State statute and their appraisal of a State trial court's instructions thereunder potentially into a question of "fundamental due process." This result would impose an additional burden on our already overburdened federal courts and pose an unnecessary and undesirable threat of greatly increased federal intervention in cases involving the sufficiency of jury instructions and the construction of State law. Any such interpretation would be contrary to the proper role of historic federal habeas corpus jurisdiction, namely, not to serve as the basis for merely an additional appeal.[11] As the Supreme Court has stated:

> "His [the trial judge's] action has been affirmed by the highest court of the Commonwealth. We are not

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10 *Gemmel* v. *Buchkoe*, 358 F.2d 338, 341 (6th Cir.), *cert. denied*, 385 U.S. 962 (1966) (allegedly erroneous instruction with regard to the theory of murder in the perpetration of a robbery).

11 See *Grundler* v. *North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960) Soboloff, *Ch.J.*; *Gemmel* v. *Buchkoe*, 358 F.2d 338, 340 (6th Cir. *cert. denied*, 385 U.S. 962 (1966).

at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal question." [12]

Reversed.

[12] *Gryger v. Burke*, 334 U. S. [illegible]

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. 13,443

JACOB SCHAEFER,

Petitioner,

vs.

DANIEL LEONE, Warden, Hartford Correctional Center,

Respondent.

MEMORANDUM OF DECISION ON PETITION FOR A WRIT OF HABEAS CORPUS

By this habeas corpus petition, Jacob Schaefer seeks release from his imprisonment following conviction by a jury on March 18, 1968, on a single count of pool selling in violation of Conn. Gen. Stats. § 53-295, as amended. *State v. Schaefer,* CR-17-5828 (Cir. Ct. 17, Mar. 18, 1969). Evidence seized from petitioner's possession and introduced at trial included: two pieces of paper identified at trial as bookmaker's "tally sheets," a National Armstrong Daily, a publication containing current racing information and betting odds, several football schedules containing handwritten numbers identified at trial as "lines" or "point spreads," and the charred remains of other papers retrieved from petitioner's livingroom fireplace containing notations of names, initials and dollar amounts, described at trial as bookmaker's "worksheets." Petitioner appealed his conviction to the Appellate Division of the Connecticut Circuit Court, claiming error in the charge to the jury. His conviction was affirmed on June 13, 1969. *State v. Schaefer,* CR-17-5828 AP. Vol. IX, App. Div. No. 26, 1969. On June 25, 1969, petitioner requested the Connecticut Supreme Court to certify this issue for appeal. That request was denied on September 24, 1969. *State v. Schaefer,* Vol. XXXI No. 15 Conn. L.J. 9 (1969). Petitioner has exhausted his state remedies and

is properly before this court. 28 U.S.C. § 2254.

Petitioner complains that part of the trial judge's charge deprived him of his constitutional rights under the first, fifth and fourteenth amendments. The challenged instruction reads:

> 153.[1] "The statute also prohibits one from having in his possession and under his control a betting line. It does not specifically say so, or odds upon football games as the possession of this line or odds as (is) prohibited by that portion of the statute which prohibits one from being concemed in pool selling. And, if you find that the defendant did have such a line or lines or odds in his possession and under his control, you should find him guilty in this respect."

Section 53-295 defines five sets of circumstances under which a person can be found guilty of pool selling and all require more than mere possession of pool selling data.[2]

The question presented is not whether there was sufficient evidence to support his conviction, but whether that portion of the charge claimed to have been erroneous violated petitioner's constitutional

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[1] Numbers used conform to those in the finding in the state court record on appeal.

[2] The statute embraces 5 sets of circumstances warranting criminal sanction:

(1) "Any person . . . who owns, possesses, keeps, (etc.) . . . any building, room, (etc.) . . . with apparatus . . . or any device, *for the purpose . . . of buying or selling pools* . . . .;

(2) "any person who keeps *a place which is reputed to be a place reported to for the purpose of selling pools* upon the result of any election. . . . .;

(3) "any person who makes, records or registers any such wagers or bets, or buys or sells, *or is concerned in buying or selling,* any such pools, or in carrying on the business of the transmission of money to a race track or other place there to be bet.

(4) "any person who, being the owner, . . . or occupant of any building, room, (etc.) . . . *knowingly permits the same to be used or occupied for any such purpose* . . . .

(5) "Any person who becomes the *custodian of depositary* of any pools, money, (etc.) . . . or of any apparatus . . . *used for the purpose of assisting in buying or selling* any such pools or making any such wagers or bets . . ." (Emphasis added).

rights. A state court's charge to a jury is reviewable by a federal court on habeas corpus only where federal constitutional rights are involved. *Cf. Bollenbach v. United States*, 326 U.S. 607, 614-15 (1946); *Gemmel v. Buchkoe*, 358 F. 2d 338, 340 (6th Cir.), *cert. denied*, 385 U.S. 962 (1966), *rehearing denied*, 385 U.S. 1021 (1967); *Curry v. Wilson*, 269 F. Supp. 9 (N.D. Cal. 1967), aff'd, 405 F. 2d 110 (9th Cir. 1968); *Grundler v. North Carolina*, 283 F. 2d 798, 802 (4th Cir. 1960).

Contending that the portion of the charge complained of instructed the jury that his *possession of a betting line or odds upon football games was prohibited by the statute*,[3] the petitioner complains that the jury convicted him for a non-existent crime. It is clear that this is a sufficient allegation to present a federal question, for as stated by the Supreme Court in *Cole v. Arkansas*, 333 U.S. 196, 201 (1948):

> "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."[4]

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[3] The State of Connecticut, with commendable candor, concedes that "Pool Selling" is not a possessory crime. State's Memorandum of Law at 12. Indeed, even if the statute purported to make mere possession of betting lines or odds a crime it would be unconstitutional as in violation of the first amendment. The court in *Kelly v. Illinois Bell Telephone Co.*, 210 F. Supp. 456, 465 (N.D. Ill. 1962), aff'd, 325 F. 2d 148 (7th Cir. 1963), speaking of a state gambling statute, said:

> "If the government's interpretation is to be accepted, every transmission . . . or receipt of information as to wagers, betting odds on any sporting event, election, etc. by any of the established news services, such as the Associated Press, United Press International, as well as by newspapers of general circulation, would be in violation of the section in question since there is no provision exculpating them from its application . . . .
>
> "(S)uch an interpretation would require a determination that the statute in question is unconstitutional as in violation of the First Amendment to the Constitution of the United States."

See also Stanley v. Georgia, 394 U.S. 557 (1969).

[4] In that case, the defendants were charged and tried only for a violation of § 2 of a state statute. They were convicted and appealed to the State Supreme Court contending that § 2 was unconstitutional. Without passing on the question the State Supreme Court sustained the convictions on the ground that the evidence showed that the defendants had violated § 1 of the same statute.

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Although Schaefer was charged with the crime of pool selling the information did not charge him with a crime of having betting odds in his possession.

The trial judge was without authority to eliminate from the crime of pool selling the recurring element in every variation thereof that otherwise harmless articles must be possessed *for the purpose* of buying or selling pools. "The spirit of the doctrine which denies to the . . . judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute." *Morrissette v. United States,* 342 U.S. 246, 263 (1952). The three sentences complained of in the instructions to the jury (§ 153, p. 2 *supra*) were erroneous when tested either against the Constitution or against the state statute. The response of the state is that if the charge to the jury is considered in its totality there was no denial of fundamental fairness to the petitioner at his trial. That theory was adopted by the state court which decided the direct appeal.

In upholding the conviction, the Appellate Division of the Circuit Court, only vaguely referring to the challenged portion of the charge, stated:

> "The defendant also attacks the court's charge on the terms 'tally sheet' and 'lines' or 'point spreads.' The defendant did not request specific definitions of these terms and therefore should not complain. *D'Addario v. American Automobile Ins. Co.*, (142 Conn. 251 (1955)). And again, the defendant does not quote the complete charge by the court concerning these terms. The court stated: 'The statute also prohibits one from having in his possession and upon his premises papers such as a tally sheet, a register of the results of pool selling, wages, and apparatus used for the purpose of assisting in pool selling. If you find that the defendant had such a tally in his possession, under his control, then he violated the statute.' Reading this portion of the charge as well as the charge as a whole, it meets the test of correctness and adequacy and should be sustained." *State v. Schaefer, supra* at 16.

The trouble is that this was a conclusion easier to state than to demonstrate. The implication that any error in the segment of the charge complained of must be considered by resort to criteria other than its literal correctness presents the necessity of examining the

instructions the trial judge gave to the jury to determine (1) what the relationship is between the challenged portion and the rest of the instructions (a grammatical analysis of the language used); and (2) whether the language as so used was harmless (a judicial analysis). The language used may be taken from the record and this I will do shortly. The judicial analysis requires the application of a special formula to which I turn first because of the implication that there was at least some error in the charge.

The Harmlessness of the Error

The general test of harmless error stated in many ways by different courts has been succinctly codified in a federal statute:

> "Harmless error
>
> "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2131.

However, the test for harmless error is more stringent where a constitutional error is in issue. Whether a criminal conviction should stand in the face of a denial of constitutional rights must be decided under the test recently fashioned by the Supreme Court in *Chapman v. California*, 386 U.S. 18, *rehearing denied*, 386 U.S. 987 (1967). That is that a retrial is required unless the error is "harmless beyond a reasonable doubt." *Id.* at 24.

Proceeding then on the hypothesis that an error may be harmless beyond a reasonable doubt, *id.* at 22, attention initially centers on how conspicuous the error was, taking a wide screen view of the charge as a whole. A more critical scrutiny must be made then that suggested by the verbal *tour de force* of the Circuit Court that "Reading this portion of the charge as well as the charge as a whole, it meets the test of correctness and adequacy and should be sustained." *State v. Schaefer, supra* at 16. It cannot be denied that the trial judge correctly charged the jury in the "boiler plate" instructions on the presumption of innocence and the burden of proof. He discussed the pool selling statute and correctly defined a pool and pool selling; he distinguished pool selling from policy playing, and from the betting by an individual bettor. He pointed out that the defendant was charged

with being concerned in pool selling and with keeping a place with books and apparatus for such purpose. He also instructed the jury that the "statute . . . prohibits one from *registering* the results of pool selling, wagers," (emphasis added), and that a tally sheet is such a register. (§ 151). Then he came to the part of his charge which includes the challenged portion (§ 153):

152. "The statute also prohibits one from having in his possession and upon his premises papers such as a tally sheet, a register of the results of pool selling, wagers, and apparatus *used for the purpose of assisting in pool selling.* If you find that the defendant had such a tally in his possession, under his control, then he violated the statute. (emphasis added)

153. "The statute also prohibits one from having in his possession and under his control a betting line. It does not specifically say so, or odds upon football games as the possession of this line or odds as (is) prohibited by that portion of the statute which prohibits one from being concerned in pool selling. And, if you find that the defendant did have such a line or lines or odds in his possession and under his control, you should find him guilty in this respect.

154. "'Being concerned in pool selling' is defined as when one has some connection with pool selling, when pool selling affects his interest or concerns him.

155. "The intent of the statute is to prohibit one from participating in or being involved or interested in pool selling or the actions which make up pool selling. Of course, the pool selling statute is lengthy.

156. "Now, the State is not required to prove that the defendant did any more than one of the acts making up pool selling, and if you find that the State has proved the defendant did any one of the acts prohibited by the statute, then by evidence beyond a reasonable doubt, then your verdict should be guilty. If you don't, then, of course, your verdict should be not guilty."

Nothing in the charge expressly modifies or supplements the trial judge's instruction in No. 153.

Confining an appraisal of No. 153 within the context of so much of the charge as is discussed above, *West v. United States*, 359 F. 2d 50, 54 (8th Cir.), *cert. denied*, 385 U.S. 867 (1966); *United States v.*

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Nadler, 353 F. 2d 570, 573 (2d Cir. 1965), it may not be unreasonable to suppose that a lawyer, or even an astute and experienced juror might say to himself of No. 153, "surely that cannot be so."[5] But when earlier instructions in the course of the charge to the jury are also taken into account, it is not possible to believe that the jury would have modified or rejected the challenged instruction. For the trial judge had told the jury:

> "It is my function to tell you what the rules of the law are applicable to the evidence in this particular case, and it is your duty to accept and follow these rules as I give them to you." No. 116

And, even more emphatically, he further instructed them:

> "And you must take the law from me as I give it to you. You see, if you disagree with the law as I give it to you and you go into the jury-room and you apply your notion of the law and - - or what you think the law should be, that would be a great error." No. 119
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> "Whatever I say or do here is recorded, and if I make an error, it can be corrected by a higher tribunal, but if you make an error in the jury-room, that cannot be corrected. There is no record of it. So, I am going to ask you to please go by what I tell you to be the law." No. 120

The judge thereafter charged the jury that if the state proved that the defendant did any one of the acts prohibited by the statute they might find him guilty. No. 156. But, just because there may have been a proper charge and adequate evidence to convict on another ground, the error in the charge on possession of "point spreads" cannot be held harmless.[6]

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[5] "We of course do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the (charge) on the minds of an average jury." *Harrington v. California*, 395 U.S. 250, 254 (1969).

[6] If the charge as to possession of "point spreads" was not harmless, then the conviction cannot stand since "the verdict of the jury for all we know may have been rendered on that ground alone, since it did not specify the basis on which it rested." *Williams v. North Carolina*, 317 U.S. 287, 292 (1962); *Stromberg v. California*, 283 U.S. 359, 368 (1931). "It has long been settled that when a case is submitted to the jury on alternative theories

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When viewed in the light of the final argument of defendant's counsel to the jury, the erroneous part of the charge stands out in even sharper focus. He argued that the possession of a publicly distributed paper containing information of betting odds on sporting events, similar to that in the National Armstrong Daily, which was introduced into evidence against defendant, did not constitute a criminal offense.[7]

The defendant's objection to the challenged portion of the charge was saved for review by timely exception,[8] which the trial judge cursorily rejected.

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the unconstitutionality of any of the theories requires that the conviction be set aside." *Leary v. United States*, 395 U.S. 6, 31, 32 (1969); *Beck v. United States*, 298 F. 2d 622, 631 (9th Cir.), *cert. denied*, 370 U.S. 919 (1962). The rule applies even where the general verdict was rendered by a judge, not a jury. *Street v. New York*, 394 U.S. 576, 586 (1969). cf. *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

[7] He argued: "I presented to him (a state witness) a newspaper which I got that day at a local drugstore or a restaurant here in town named Novack's, and there next to every team is a line, next to every team there're lines. Now, if they found this in his house, in Mr. Schaefer's home, which anyone of you could walk out during the first recess or at lunchtime and buy, they would tell you this is a device by which bookmakers do their business. An innocent document lying in a home and understand, ladies and gentlemen, Mr. Schaefer is not on trial for anything else but accepting wagers, and you go through that entire potpourri of evidence and you wouldn't find one record of a wager." (Tr. at 463-64).

A defendant is entitled to have the jury clearly instructed regarding the law covering his theory of the case if there is evidence to support it. *McAffee v. United States*, 105 F. 2d 21, 26 (D.C. Cir. 1939). At no point was the jury told that mere possession of betting odds without more was an insufficient basis for conviction.

[8] The exception is found in § 164 of the finding: "Having possession of a betting line or odds in his possession is a violation of this statute and as indicating that one is being concerned in pool selling. Well, that doesn't cover the transient bettor who may have the *Hartford Courant* with the lines in it, and I spent some considerable time trying to demonstrate to this jury that the members of the public can have this information in their homes at all times and not be guilty of having possession of a betting line or odds as a violation of the statute. An extremely prejudicial charge on that. May it be respectfully noted that I take exception."

The retrial which must be afforded could have been avoided had the judge acted on counsel's timely exception to this portion of the charge. *United*

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Conclusion

The challenged portion of the instructions permitted the jury to convict the petitioner on a charge that not only was never made, *cf. Cole v. Arkansas, supra,* but moreover one which would be constitutionally impermissible. Note 3 *supra.*

Whether one applies the rule of "harmless beyond a reasonable doubt" fashioned in *Chapman v. California, supra,* where the defendant's fifth amendment rights were violated, or the rule of automatic reversal, contended for in *Chapman* by Mr. Justice Stewart in his concurring opinion:

> "Reversal is required when a conviction may have been rested on a constitutionally impermissible ground, despite the fact that there was a valid alternative ground on which the conviction could have been sustained (citing *Stromberg v. California,* 283 U.S. 359, 367-68; *Williams v. North Carolina,* 317 U.S. 287, 292)." *Chapman v. California, supra* at 44.

the conclusion that the petitioner's constitutional rights were violated at his trial is inescapable. The erroneous charge was not harmless beyond a reasonable doubt.

The writ is sustained, and it is

ORDERED that the petitioner be discharged from the respondent's custody unless within twenty (20) days from the date of this opinion and order the State of Connecticut vacates the judgment of conviction, reinstates petitioner's plea of not guilty and schedules an early retrial.

Execution of the foregoing order will be stayed to allow for an appeal by respondent, if one is taken. To obviate any additional delay, I hereby grant the certificate of probable cause required by 28 U.S.C. § 2253.

In view of the risk that the full term of his sentence (362 days) may be served before an appeal is completed and a retrial is held, and the fact that the state court has interpreted its statutes to deny it the power to admit one committed under a mittimus to bail, see *State v. Magoon,* No. 4376 (Super. Ct., Middlesex County, Nov. 22,

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States v. Indiviglio, 325 F. 2d 276, 280 (2d Cir. 1965) (en banc), *cert. denied,* 383 U.S. 907 (1966). *Cf. Henry v. Mississippi,* 379 U.S. 443, 448, *rehearing denied,* 380 U.S. 926 (1965).

1968), the petitioner may be admitted to bail upon his recognizance with surety equal to that on his previous bail bond to the Circuit Court, Fed.R.App.F. 23 (a), and it is

SO ORDERED.

Dated at Hartford, Connecticut, this 12th day of November, 1969.

M. JOSEPH BLUMENFELD
United States District Judge

APPENDIX C

STATE OF CONNECTICUT *v.* JACOB SCHAFER

APPELLATE DIVISION OF THE CIRCUIT COURT

FILE NO. CR 17-5828

The defendant, convicted of the crime of pool selling (§ 53-295), moved unsuccessfully to suppress and have returned evidence obtained under a search warrant. The affidavit in the warrant contained, inter alia, allegations that the police had confidential information from a reliable informant, that the usual pattern of pool-selling activity had been observed, and that the informant had observed the defendant pick up horse race bets from a convicted gambler. It also described the conduct of the defendant during the usual time for placing wagers. *Held* that the affidavit disclosed that there was probable cause to believe that the defendant was in the business of pool selling and clearly justified the issuance of the warrant.

The defendant further moved that the trial judge disqualify himself on the ground that some fifteen years earlier he had been a member of a parole board which had ruled against the defendant's request for parole and that, in view of the defendant's then having expressed himself on that ruling, the judge might have developed an animosity toward him. The judge denied the motion, noting that he had no recollection of the incident to prejudice his conduct in the trial, which, as he had earlier pointed out, was to the jury. *Held* that there was no statutory or other substantial ground for the requested disqualification.

The remark of the trial judge, in the absence of the jury and addressed to both counsel, that if he detected any effort to create a situation where there would be a mistrial he would resort to contempt proceedings was well within his duty and responsibility to make in order to attain an orderly progress of the trial.

The court's remarks referring to certain testimony as "dress-up" and "verbiage" were an attempt to keep what was a heated contest within orderly bounds. The defendant was not prejudiced by the court's comments.

The prosecutor's argument, in substance, to the jury that the search of the defendant's house, person and car was the result, not of animosity or of spite, but on the authority of a search warrant, was not an assertion that there was probable cause to conduct the search. Inasmuch as evidence had been introduced at the start of the trial that a search warrant had been authorized, the argument was not so prejudicial as to cloud the presumption of innocence, especially since the court, in its general instruction, charged on this subject.

The court did not abuse its discretion in admitting into evidence the opinion of a detective, testifying as an expert, as to certain markings on charred paper seized from the fireplace in the defendant's house.

An appellate court should not create substance out of shadows, conjure up errors out of trifles, or seek for judicial irregularity by microscopic processes.

The giving of an instruction on the doctrine of falsus in uno, falsus in omnibus is within the discretion of the court, and refusal to give such an instruction is not prejudicial error.

The failure of a party to call as a witness one who is available to both parties and who does not stand in such a relationship to the party in question or to the issues that that party would naturally be expected to produce him if his testimony was favorable affords no basis for an unfavorable inference. Thus, under the circumstances here, the court properly refused to charge that, since the state failed to call an officer as a witness, the jury might infer that his testimony would be unfavorable.

Section 53-295 being a lengthy statute, the court did not read it in its entirety to the jury. Rather it read only the portions of it which were here pertinent. Such action was entirely consistent with proper judicial procedure.

Argued March 24—decided June 13, 1969

Information charging the defendant with the crime of pool selling, brought to the Circuit Court in the seventeenth circuit and tried to the jury before *Monkiewicz, J.*; verdict and judgment of guilty and appeal by the defendant. *No error.*

John P. McKeon, of Hartford, for the appellant (defendant).

Dennis F. Gaffney, assistant chief prosecuting attorney, for the appellee (state).

DiCenzo, J. The information charged the defendant with violation of General Statutes § 53-295, entitled "Pool Selling." No bill of particulars was sought, and no objection was made to going forward

with the trial without further specification of the particular part or section of the statute relied on by the state. After a trial to the jury, the defendant was found guilty and has appealed from the judgment.

Under the provisions of § 53-295, it is unlawful, inter alia, to maintain or occupy any place with apparatus, books or any device for the purpose of registering bets or wagers on the result of any trial or contest of skill, game, race or endurance of man, beast, bird or machine. This includes horse races and ball games. *State* v. *Rich,* 129 Conn. 537, 540.

On December 22, 1966, pursuant to § 54-33f of the General Statutes, the defendant filed a motion to suppress evidence allegedly obtained illegally and for the return of property so obtained on the ground that (1) the property was seized by a search warrant which was insufficient on its face; (2) there was not probable cause for believing the existence of the grounds on which the warrant was issued; (3) the warrant was illegally executed and/or issued; and (4) the search and the seizure of the property were accomplished by an invalid search warrant and in violation of the defendant's rights under the fourth amendment to the federal constitution and under article first, § 7, of the Connecticut constitution. See General Statutes § 54-33a.

The motion to suppress was denied *(Ciano, J.).* The defendant attacks the denial of the motion to suppress. The search and seizure warrant was issued for the search of the defendant, his residence and two automobiles used by him but registered in

the name of Beverly Schafer. The affidavit contained allegations that the defendant was violating § 53-295 of the General Statutes; that the police officers had confidential information from a reliable informant; and that the usual pattern of pool-selling activity was observed. A trooper stated in the affidavit that the informant observed the defendant pick up horse race bets from a convicted gambler. The informant was present when telephone calls were placed with the defendant's telephone number and horse race bets were placed. The conduct of the defendant during the usual time for placing wagers was described, together with his associations during that time. The affidavit in the instant case is clearly distinguishable from the affidavit discussed in *Spinelli* v. *United States*, 393 U.S. 410, in that it sets forth several of the underlying circumstances, reasons for the reliability of the informants, actual betting transactions by known convicted gamblers, both by telephone and in person, and personal observations of the conduct of the defendant by the affiants at the places and times supplied by the informants. The affidavit also sets forth that the defendant was a multiconvicted bookmaker and was observed by the affiants, in a surveillance spreading over four days, to be always at home during the so-called betting hours. In *Spinelli*, supra, the affidavit was found to be insufficient for several reasons: (1) There was no support for the affiant's conclusions that the informant was reliable; (2) the informant did not provide a sufficient statement of the underlying circumstance; (3) there were no allegations that the informant personally observed the defendant in any betting action or ever placed a bet with him. In the instant case, the affidavit did disclose

that there was probable cause to believe that the defendant was in the business of pool selling and clearly justified the issuance of the search warrant. See *Aguilar* v. *Texas*, 378 U.S. 108, 114; *Henry* v. *United States*, 361 U.S. 98; *Johnson* v. *United States*, 333 U.S. 10, 14; *Dumbra* v. *United States*, 268 U.S. 435, 441; *State* v. *Wilson*, 153 Conn. 39. This assignment of error is without merit.

As to the court's refusal to quash the information on the ground that the pool-selling statute is unconstitutional, we do not consider this assignment, since during oral argument the defendant stated that he would not pursue this claim.

There are twenty-two assignments of error, and for purposes of clarity we will discuss them as nearly as possible in the order in which they are claimed to have occurred at the trial and not in the numerical order in which they appear in the defendant's assignment of errors.

As soon as the court stated that it was ready to proceed with the trial, the defendant moved that the courtroom be cleared and that the presiding judge disqualify himself. The defendant offered as a basis for his motion that some fifteen years prior the presiding judge was a member of the United States parole board and as such had then ruled adversely to the defendant's request for parole. The defendant further asserted, in support of one motion, that he had expressed himself as the result of the United States parole board ruling and that some of his words may well have reached the ears of the trial court, developing animosity. The court denied the motion, stating that there was "no memory in my mind that could, in any way, make me act illegally or

improperly in this case." Earlier, the court had pointed out that this was a jury case. Exception was noted by the defendant, and he assigns error in the court's denial of the motion.

Section 51-39 of the General Statutes sets forth the statutory reasons for a judge's disqualification. The defendant does not claim that there were statutory disabilities in this case, and there do not appear to have been any. A very similar situation was disposed of in *State* v. *Kohlfuss*, 152 Conn. 625. In that case, the sentence review division had heard the defendant's application for review of his sentence. After the hearing, the review division increased the sentence from two to three years. After being arrested for a subsequent crime while on parole, the defendant was finally presented for trial before a judge who had been one of the three members of the review division when the defendant's sentence was increased. Even though, in *Kohlfuss*, no timely claim was made that the trial judge should disqualify himself, the Supreme Court pointed out (p. 629): "In the first place, in a consideration of this claim of disqualification, it should be noted that the sentence review division has nothing to do with the ascertainment of guilt or innocence. Its powers are limited to a review of the sentence imposed." The common-law rule is that no judge should preside in a case in which he is not wholly free, disinterested, impartial, and independent, and in general the rule of disqualification should not have a narrow or technical construction but rather should be broadly applied in all cases where a judge is called to act judicially or to decide between conflicting rights; and no judge should try a case in which there is any substantial

ground on which to base a claim of disqualification. 48 C.J.S., Judges, § 72. In the instant case, there was no statutory nor any other substantial ground for disqualification of the trial judge.

The defendant's attacks on the conduct of the trial judge throughout the trial are set forth in assignments of error. Prejudice and unfairness are the keynotes of the attacks on the trial judge. "An assignment of this nature is one not lightly to be made or summarily to be disposed of. Because of the gravity of the accusation, which strikes at the very core of judicial integrity and tends to undermine public confidence in the established judiciary, we have examined the record with infinite care, in fairness and justice both to a litigant in the case at bar and to a member of the bench of this state." *Felix* v. *Hall-Brooke Sanitarium*, 140 Conn. 496, 501. We have done no less in the instant case.

We view part III of the defendant's brief as an unwarranted attack on a judge of this state.[1] There is ample authority for striking the defendant's brief in its entirety and on the court's own motion. Note, 111 A.L.R. 879, 882–84. In the interests of justice and dispatch, however, we order part III only of the defendant's brief stricken from the files of this case.

[1] The scandalous and deplorable language chosen and the animadversions upon the trial court are unwarranted and indefensible. It is our duty to keep the files and records of this court free from scandalous matters, and especially so when such matters are not basically connected with the merits of the case. In *Green* v. *Elbert*, 137 U.S. 615, 624, Mr. Chief Justice Fuller, speaking for the court, said: "The printed argument of plaintiff in error contains many allegations wholly aside from the charges made in his complaint, and bearing reproachfully upon the moral character of individuals, which

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Returning to the assignments of error attacking the conduct of the court at the trial, we examine them individually. The defendant claims that the comment of the trial court, "You can mark me for identification for that matter. You can mark anybody for identification," was a "flippant rejoinder." We are of the opinion that this was the court's manner of stating the rule that there is no discretion in the court in marking exhibits for identification. In *Duncan* v. *McTiernan*, 151 Conn. 469, 470, our Supreme Court said: "It was manifest error for the court to refuse to permit the documents to be marked as exhibits for identification. The court had no discretion to refuse such a request, because to allow such discretion would permit a trial judge to deprive an aggrieved party of a proper record for an appeal."

The defendant attacks the following admonition of the court to both counsel: "I think the time has come when I must state my position. If I detect—I'm referring to both sides. If I detect any effort to create a situation where there will be a mistrial, I'm going to indulge in examining the conduct of the lawyers and if it's within the lawyer's realm to know

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are clearly impertinent and scandalous, and unfit to be submitted to the court." In *Royal Arcanum* v. *Green*, 237 U.S. 531, 546, Mr. Chief Justice White, speaking for the court, said: "The printed argument for the defendant in error is so full of vituperative, unwarranted and impertinent expressions as to opposing counsel that we feel we cannot, having due regard to the respect we entertain for the profession, permit the brief to pass unrebuked or to remain upon our files and thus preserve the evidence of the forgetfulness by one of the members of this bar of his obvious duty. . . . Following the precedent established in *Green* v. *Elbert*, 137 U.S. 615, which we hope we may not again have occasion to apply, the brief of the defendant in

that he should not have done something that created the mistrial, I will resort to statutory contempt proceedings, if I have to declare a mistrial. I'm stating this for the benefit of both sides." The defendant claims that this was a threat of contempt proceedings to deter defense counsel from any further questioning and therefore the court was destroying the presentation of the defendant's case. It is to be noted that these expressions were made by the court in the absence of the jury and were in fact directed to both counsel for the state and counsel for the defendant. Considering the history of this case, the number of objections of both counsel, the repeated requests that the trial court disqualify itself and the wrangling of counsel, as appears from the evidence, we are of the opinion that the trial court was well within its duty and responsibility to attain an orderly progress of the trial.

The defendant attacks the comments of the court during the following testimony: "Mr. McKeon, in cross-examination of Lieutenant Page: Q.—You

error is ordered to be stricken from the files . . . ." In Connecticut, as early as 1787, in *Lankton* v. *Scott*, Kirby 356, scandalous matter contained in documents filed with the court was recognized and declared to be ground for abatement. In *Pradlik* v. *State*, 131 Conn. 682, 683 n.1, the court declined to receive a brief from a professor of the Yale Law School: "The brief of the amicus curiae was, in the study of the case, found to contain unwarranted aspersions upon the good faith and fair dealing of the state's attorney in the prosecution of the original case against the plaintiff and in connection with the present proceeding, and, to a less extent, aspersions upon the trial court. It was, therefore, ordered that the brief be stricken from the files." "A brief in no case can be used as a vehicle for the conveyance of hatred, contempt, insult, disrespect or professional discourtesy of any nature for the court of review, trial judge, or opposing counsel; invectives are not argument, and have no place in legal discussion, but tend only to produce prejudice and discord." 5 C.J.S. 347, Appeal and Error, § 1327, and cases cited.

mean after you're told that the person who is allegedly going to take your bet is not available, you then give the bet to the person who is talking and gives you this story? A.—That's right. Q.—Then you would have us believe that this is a standard procedure based on your long experience as an expert? Mr. McDonald: I'll object to the phrase. The court: Sustained. Mr. McKeon: May I know the grounds, Your Honor? The court: Commonsense grounds. You're twisting the facts. Mr. McKeon: May I know the exact fact I twisted, Your Honor? The court: I've told you, you're twisting the facts and you should know."

We feel that this was this court's manner of stating the rule that in cross-examination it is improper to misquote evidence. There was nothing in the testimony of the expert officer concerning standard procedures, and when the defendant's counsel asked the court for the grounds on which the court sustained the objection, the court set forth in its own way that the question included facts not in evidence. The exclusion of such a question was within the discretion of the court. "Whether an expert should be permitted to state his opinion upon the testimony as he heard it given in the courtroom, or whether all the facts embraced in the evidence should be incorporated in the question lies within the discretion of the trial court." Holden & Daly, Conn. Evidence § 118, p. 551. and cases cited. Our view is that the court was well within its discretion in the ruling.

The defendant attacks the trial court's comments at a point in the direct examination of Attorney Pearl. Pearl had been testifying to his presence in the home of the defendant at the time of the search

and that the defendant had told him he was in the art business. The following occurred: "Mr. McKeon: Q.—How many paintings did you notice on the premises, and where did you see them? A.—Well, starting in the garage where his vehicle was, there were I think, four in the back of his car. This was one—There were four in his car that he pointed out to me. In the garage itself were what, as I say, I think were lithographs. I'm not really sure about that. Q.—How many, sir? A.—There was a pile. This is the old—you know—the old story. I don't know what's underneath the first one. Q.—Yes? A.—I think they were lithographs. Q.—Right. A.—I just don't remember. Inside the house I remember, to the exclusion of everything else, the one picture that I had seen—that was—— Mr. McDonald: Well, I'm going to object to this 'one picture.' I don't see how this is relevant. Mr. McKeon: I asked him if—what he noticed in the way of paintings in the house. It's responsive, Your Honor, it's relevant. The court: I doubt not to this extent. Why all this dress-up and all that? Mr. McKeon: I don't understand that expression, Your Honor. The court: Well, why all the verbiage, and he's interested in objects of art and pictures?"

Even if we were to concede that it was error for the court to exclude the question and make the remark, which we do not, it could not be reversible error. This was another attempt by the court to keep this heated contest within orderly bounds. "Not every departure from the norm, however, is reversible error." *Felix* v. *Hall-Brooke Sanitarium*, 140 Conn. 496, 502. It does not appear that the defendant was prejudiced by the court's remarks.

Two assignments of error are directed to the failure of the trial court to declare a mistrial during several periods of the trial. One assignment claims that the court erred in allowing the prosecutor to argue that the premises were searched under a search warrant from the Circuit Court and therefore a motion to declare a mistrial should have been granted. During the course of the state's closing argument, after the defendant had argued, the state for the first time in its argument to the jury raised the fact that the police entered the defendant's home pursuant to a search warrant. The defendant claims that this was improper and was not cured by a proper instruction from the court to the jury. The substance of the prosecutor's argument to the jury was that the search of the defendant's house, person and car was the result of a court search warrant and not because of animosity or spite. The statement of the prosecutor was not to the effect that there was probable cause to conduct a search. Inasmuch as evidence had been introduced at the start of the trial that a search warrant had been authorized, it does not appear that the argument of the prosecutor was so prejudicial as to cloud the presumption of innocence, as claimed by the defendant. This is especially so in view of the court's general instruction that "the law presumes an accused person innocent unless and until his guilt is established by the evidence." And again, later, the court instructed the jury: "When the presumption of innocence is overcome or removed by evidence proving beyond a reasonable doubt that the accused person is guilty of the crime charged, then . . . ." The cases cited by the defendant in support of this claim of error are not analogous. *Schotis* v. *North Coast Stevedoring Co.*, 163 Wash. 305, an action against a Japanese

corporation in which some of the witnesses for the defense were Japanese, involved (p. 315) repeated appeals to racial and religious prejudices by the plaintiff's counsel in addressing the jury, appeals which were continued after objection and after cautioning by the court and referred to the Japanese as nonbelievers in God, before whom they had sworn to tell the truth, and as people who do not like, and are disliked by, citizens of the United States. The court held this to be prejudicial error. Also not analogous is *Mudrick* v. *Market Street Ry. Co.*, 11 Cal. 2d 724, 737, in which it was held that the making by counsel for the plaintiff of statements, in opening the case to the jury, which he did not attempt to prove and knew could not be proved was not prejudicial error where the trial court instructed the jury that there was no evidence to support counsel's statements.

The other assignment of error directed to the court's failure to declare a mistrial was not pursued in the defendant's brief and is considered abandoned. *Bridgeport Hydraulic Co.* v. *Stratford*, 139 Conn. 388, 390; Maltbie, Conn. App. Proc. § 327.

An assignment of error is directed to the admission into evidence of an opinion by Detective McDonnell, who, testifying as an expert witness, was asked by the prosecuting attorney to interpret the markings on charred papers seized from the Schafer living room fireplace and preserved and entered as exhibits at trial. "Mr. McDonald: And do these figure amounts have any significance to you? A.—Yes, in my opinion they would be dollar amounts. They would be either owed to the bookmaker or owed by the bookmaker. And the bookmaker has done some bookkeeping, worked over these figures and made a check of the ones he's

computed and the words 'entered' would indicate to me that this information has been transferred to some other book or paper, some other record. Q.—What would that other record be called? A.—That would be his final tally sheet. Q.—Similar to the tally sheets already in evidence testified to? A.—Could be. Mr. McKeon: Well, Your Honor, I move that that go out—'could be'—that's speculation."

It is conceded that the witness was testifying as an expert. The ruling was within the discretion of the trial court. "The judge at the trial is in so much better position than an appellate court to determine when a witness should be permitted to give opinion evidence that his rulings should be accepted save in the most exceptional circumstances." Model Code of Evidence rule 401, comment c. "[T]he standard actually applied by the trial judges of today approaches more nearly the principle espoused by Wigmore, namely that the opinion should be rejected only when it is superfluous in the sense that it will be of no value to the jury." McCormick, Evidence, p. 23; see *Stephanofsky* v. *Hill*, 136 Conn. 379, 385. The court did not abuse its discretion.

An assignment of error is directed to an alleged misinterpretation by the court of alleged impeaching evidence. In cross-examination of Detective McDonnell, a witness for the state, the defendant had offered the witness' original notes of what had transpired at the Schafer home. While the defendant was cross-examining from these notes, the following ensued: "The court: I mean let's make some sense out of this. You're offering his notes. Mr. McKeon: Yes, Your Honor. The court: You're bound by those? Mr. McKeon: Well, Your Honor, I'm offer-

ing to impeach the credibility by the weight. I'm not bound by them at all, Your Honor. And, Your Honor, I would ask that that statement of law be immediately cleared up with the jury. I say it's highly prejudicial. I'm not bound by anything this man says. I claim prejudice from the court's remarks. The court: Might the jury be excused until 2:00."

"The omission of a form, or the transgression of a rule . . . in the course of a trial, of such a nature that no harm therefrom to the parties is possible, cannot render the result unjust." *State* v. *Brockhaus*, 72 Conn. 109, 113. "[N]one save fundamental and substantial errors which may do a litigant injustice can or ought to furnish ground for disturbing a judgment rendered in substantial accord with the principles of law." *Turgeon* v. *Woodward*, 83 Conn. 537, 547. "If our jury system is to continue to be a practical and working one, and productive of reasonably satisfactory results, it must be given a chance to operate within human limitations as respects both judge and jury, and have reasonable presumptions applied to its operation. Substantial errors will be committed for which a remedy must be given, but an appellate court ought not to be expected to create substance out of shadows, to conjure up errors out of trifles, or to seek for judicial irregularity by microscopic processes, speculative imaginings, or refined reasoning." *Foote* v. *Brown*, 81 Conn. 218, 227; see Maltbie, Conn. App. Proc. §§ 20–36. The defendant was not harmed by the court's ruling.

An assignment of error refers to the defendant's claim that the court erred in failing to reprimand the prosecutor for claimed improper argument. The

court admonished both counsel. The prosecutor's references to a motion to suppress were harmless. Another assignment of error attacks the order of the trial court, over objections, that $853 be deposited with the state during the pendency of this appeal. This assignment has not been briefed and is considered abandoned.

Assignments of error also deal with the court's charge or failure to charge as requested. The defendant requested the court to charge the jury on the doctrine of falsus in uno, falsus in omnibus. The court did not do so. However, it carefully instructed the jury on the credibility of witnesses, including the truthfulness of testimony, motives, bias, prejudice and interest or lack of interest in the outcome of the trial. As stated in *Miles* v. *Sherman*, 116 Conn. 678, 683, "We would not ordinarily predicate error upon the failure to instruct specifically that if the jury found a witness had testified falsely upon one subject, it was within their province to disregard any or all of his testimony in accordance with the maxim, *falsus in uno, falsus in omnibus*. *Kornblau* v. *McDermant*, 90 Conn. 624, 636 . . . . The rule at best is but an application of one of the considerations in everyday use when men are called upon to test the sincerity and honesty of their fellows, and one which the jury would, if they deemed the circumstances warranted it, naturally apply in any event; its statement at most merely calls attention to one circumstance which may, but does not necessarily, determine the credibility of a witness." The reasoning of the *Miles* court is in conformity with the prevailing attitude of all courts. The maxim is treated with tolerance and sufferance, laboring under faint praise and being generally regarded as of little assistance to juries. *Virginian*

Ry. Co. v. *Armentrout,* 166 F.2d 400; note, 4 A.L.R.2d 1077. In fact, some courts have gone so far as to say that an instruction based on the maxim should not be given. *Knihal* v. *State,* 150 Neb. 771; 53 Am. Jur., Trial, § 784. Most courts maintain that the giving of the instruction is within the discretion of the court and agree that the failure or refusal to give an instruction based on the maxim is not prejudicial error. Note, 4 A.L.R.2d 1077, and cases cited; Holden & Daly, Conn. Evidence §§ 63a, 125a.

The defendant requested the court to charge the jury that since the state failed to call Chief Triano as a witness the jury might infer that his testimony would be unfavorable to the state. The court did not do so. It is a well-settled rule that if a party knows of the existence of an available witness on a material issue and the witness is within his control, and if, without satisfactory explanation, the party fails to call the witness, the jury may draw the inference that the testimony of the witness would not have been favorable to the party. *Secondino* v. *New Haven Gas Co.,* 147 Conn. 672, 675; 29 Am. Jur. 2d, Evidence, § 180. In the present case, however, the testimony of Chief Triano at the first trial was equally available to both parties. The testimony was of a cumulative nature and did not reflect any peculiar or superior information. Furthermore, contrary to the defendant's contentions, the chief was available at the time the defense proceeded with its case. The defendant, who employed the same counsel at both trials, neither subpoenaed the chief as a witness nor requested an adjournment of the trial for the purpose of bringing this witness to court. General Statutes § 54-2a; Practice Book § 468. As stated in *Secondino,* supra, 676, "The failure of a party to

call as a witness a person who is available to both parties and who does not stand in such a relationship to the party in question or to the issues that that party would naturally be expected to produce him if his testimony was favorable affords no basis for an unfavorable inference." See also *State* v. *Alterio*, 154 Conn. 23, 31; *Yavis* v. *Sullivan*, 137 Conn. 253, 263; *Ezzo* v. *Geremiah*, 107 Conn. 670, 677; *State* v. *Dayton*, 23 Conn. Sup. 271, 274, 1 Conn. Cir. Ct. 192, 195; Underhill, Criminal Evidence (5th Ed.) § 171, p. 325. The court properly refused to charge as the defendant requested.

The defendant makes several attacks upon the court's charge to the jury regarding the pool-selling statute. Since § 53-295 is a lengthy statute, the court did not read the entire statute to the jury but only the pertinent portions thereof. Such action is entirely consistent with proper judicial procedure. Maltbie, Conn. App. Proc. § 77; 2 Wright, Conn. Jury Instructions § 718. Thereafter, the court proceeded to define various terms used in the statute and distinguished these from other terms and other statutes. The defendant complains that the court did not adequately define the term "pool selling" to the jury. But the defendant did not request a charge on a specific definition of the term and therefore is not in a position to complain. *D'Addario* v. *American Automobile Ins. Co.*, 142 Conn. 251, 256. Furthermore, the court did charge that "[a] pool in gambling is the totality of bets upon a contingency. Pool selling involves the selling—evokes the selling or distribution of shares or chances in a wagering enterprise, on the outcome of an event." This definition conforms in substance, if not in form, to the definition espoused by the defendant and has been endorsed by the courts of this state. The defendant also attacks the court's charge on the terms "tally

sheet" and "lines" or "point spreads." The defendant did not request specific definitions of these terms and therefore should not complain. Ibid. And again, the defendant does not quote the complete charge by the court concerning these terms. The court stated: "The statute also prohibits one from having in his possession and upon his premises papers such as a tally sheet, a register of the results of pool selling, wages, and apparatus used for the purpose of assisting in pool selling. If you find that the defendant had such a tally in his possession, under his control, then he violated the statute." If this portion of the charge is read with the charge as a whole, it meets the test of correctness and adequacy and should be sustained. *State* v. *Johnson*, 139 Conn. 89, 93; *State* v. *Tomassi*, 137 Conn. 113, 124.

The charge considered as a whole fairly described to the jury the class covered by § 53-295 as well as some of the classes excluded. This disposes of the defendant's claim that the charge was erroneous in regard to the class of bettors excluded from the pool-selling statute. The charge stated the correct principles to guide the jury so that no injustice would result. Maltbie, Conn. App. Proc. § 92. As stated in *Farlow* v. *Connecticut Co.*, 147 Conn. 644, 648, "'A charge . . . is not to be critically dissected for the purpose of discovering possible inaccuracies of statement, but it is to be considered rather as to its probable effect upon the jury in guiding them to a correct verdict . . . .'" There is no merit to any of the defendant's attacks on the court's charge to the jury regarding the pool-selling statute.

There is no error.

In this opinion DEARINGTON, J., concurred; JACOBS, J., concurred in the result.

APPENDIX D

STATE OF CONNECTICUT *v.* JACOB SCHAFER

The petition by the defendant for certification for appeal from the Appellate Division of the Circuit Court is denied.

John P. McKeon, in support of the petition.

Dennis F. Gaffney, assistant chief prosecuting attorney, in opposition.

Submitted July 7—decided September 24, 1969